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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SALINAS REGIONAL OFFICE

In the Matter of:	**Case Nos.: 03-CE-9-SAL**
	03-CE-9-1-SAL
GALLO VINEYARDS, INC.,	
Respondent,	**VENTURA COUNTY AGRICULTURAL ASSOCIATION'S RESPONSE TO BOARD'S REQUEST FOR WRITTEN ARGUMENT**
and	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	
Charging Party.	

Ventura County Agricultural Association, (hereinafter "VCAA") hereby respectfully submits its Response to the Board's Public Notice and Request for Written Argument in the above-captioned matter.

I. INTRODUCTORY STATEMENT

In its consideration of the above-captioned matter, the ALRB has invited argument on the following questions:

1. What are the existing standards under the **Agricultural Labor Relations Act** and the **National Labor Relations Act** regarding the level of unlawful employer assistance, short of instigation, that warrants dismissing a decertification petition

and setting aside any subsequent election, i.e., is any level of assistance sufficient, or must the assistance be of a particular nature or scope in order to warrant the remedy of dismissing the petition?

2. Do the factors listed in ***Overnite Transportation Co.*** (2001) 333 NLRB 1392, apply in cases involving unlawful employer assistance in procuring the showing of interest for a decertification petition?

3. Are NLRB cases involving unlawful employer assistance, in the context of withdrawals and recognition or RM petitions, apposite or inapposite to cases involving only employee-initiated decertification petitions?

II. ALRB'S STANDARD FOR SETTING ASIDE ELECTIONS

The chief means by which the **Agricultural Labor Relations Act** (ALRA or Act) meets its stated goals of ensuring peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations is by the provision of secret ballot elections in which free choice of those workers for or against representation by a labor organization can be expressed. Whether that choice is between representation and non-representation or between certification and a continuation of certification, the Board views the effectuation of employee free choice as one of its fundamental goals. [***Mann Packing Company, Inc.***, (1990) 16 ALRB No. 15].

A party filing election objections has the burden of proving that misconduct warranted setting aside the election. [***Oceanview Produce Company*** (1995) 21 ALRB No. 1].

The burden of a party objecting to an election is not met merely by proving that misconduct did in fact occur, but rather by specific evidence demonstrating such conduct interfered with the employees' exercise of their free choice to such an extent that the conduct changed the results of the election. [***Oceanview Produce Company*** (1994) 20 ALRB No. 16].

The Board's review of objections to decertification elections are viewed with the same rigor with which it scrutinizes objections to representation elections. [***Jack or Marion Radovich*** (1983) 9 ALRB No. 45]. The Board must also be mindful that it is required to certify the results of a free and fair election pursuant to the provisions of Labor Code §1156.3(c) unless it is persuaded that sufficient reasons exist for the Board not to do so. [***Arco Seed Co.*** (1988) 14 ALRB No. 6].

In effect, Section 1156.3(c) creates a presumption in favor of certification, whether of a representation or decertification election. [See, e.g., ***Ruline Nursery Co. v. ALRB*** (1985) 169 Cal. App. 3d 247, 216 Cal. Rptr. 162]. Thus, a party objecting to an election bears a heavy burden to overcome. [***Brights Nursery*** (1984) 10 ALRB No. 18].

Since the Board has long employed a realistic "outcome-determinative" test and has rejected a highly technical "laboratory conditions" standard for determining whether an expression of employee free choice will be set aside. [See, e.g., ***Triple E Produce Corp. v ALRB*** (1983) 35 Cal. 3d 42, 196 Cal. Rptr. 518], a party, whether a labor organization or employer, objecting to an election can meet its burden by a showing of specific evidence that misconduct occurred and this misconduct tended to interfere with employee free choice to such an extent that it affected the results of the election. [***Brights Nursery, supra,*** 10 ALRB No. 18, pp. 6-7; in accord ***J. Oberti, Inc., et. al.***, 10 ALRB No. 50].

Lastly, the Board must also consider, as an additional factor, the nature and extent of the alleged misconduct in light of the margin of victory. [***Mann Packing Company, supra,*** 16 ALRB No. 15, p. 4 citing to ***Silva Harvesting, Inc.*** (1985) 11 ALRB No. 12 (election set aside where employers furnishing of grossly inadequate eligibility lists reasonably tended to affect employee free choice, and switch of only six votes would have changed the election outcome.)][1]

The party filing election objections bears the burden of proving by a preponderance of evidence that its objections are meritorious and warrant setting aside the election. [***G H & G Zysling Dairy*** (1994) 20 ALRB No. 3].

The ALRB utilizes the same standard in judging the impact of employer campaigning in decertification elections as in representation cases. [***Jack or Marion Radovich*** (1983) 9 ALRB No. 45].

III. LEGAL ANALYSIS

A. What are the existing standards under the **Agricultural Labor Relations Act** and the **National Labor Relations Act** regarding the level of unlawful employer assistance, short of instigation, that warrants dismissing a decertification petition and setting aside any subsequent election, i.e., is any level of assistance sufficient, or must the assistance be of a particular nature or scope in order to warrant the remedy of dismissing the petition?

Misconduct alleged to have tended to affect the results of the election must be tested by an ***objective*** standard of whether such a misstatement could be reasonably viewed as tending to interfere with employee free choice. [***Tani Farms*** (1987) 13 ALRB No. 25].

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[1] In ***Mann Packing, supra***, the ALRB ruled that the UFW failed to bear its burden of demonstrating conduct that reasonably tended to interfere with employee free choice, and in view of the wide margin of victory of the "no union" vote, the Board ruled that it would follow its statutory mandate to certify the results of that choice. The voting results demonstrated 29 votes in favor of "no union" versus 11 votes in favor of the UFW with 4 challenged ballots remaining unresolved.

Incidents of misconduct affecting the election are to be considered as a whole, as well as separately. However, to cause the Board to overturn the election, they must be so viewed so as to reflect an atmosphere in which employees were ***unable*** to freely vote. [***Harden Farms*** (1976) 2 ALRB No. 30; ***Veg-Pak, Inc.*** (1976) 2 ALRB No. 50; ***Patterson Farms, Inc.*** (1976) 2 ALRB No. 59; ***D'Arrigo Bros. of California*** (1977) 3 ALRB No. 37].

It is well established under ALRB precedent that unlawful assistance to a petitioner in circulating a decertification petition by an agricultural employer, when coupled with other unlawful conduct, may result in the setting aside of the decertification election. [***Abatti Farms, Inc.*** and ***Abatti Produce, Inc.*** (1981) 7 ALRB No. 30].

In ***Abatti Farms, supra***, leading proponents of the decertification petition were provided with leaves of absence and other benefits to facilitate their conduct. Also, the company's agents assembled agricultural employees for the purpose of obtaining signatures on various decertification petitions.

The employee who initiated the decertification effort received: (1) an extended absence from work to circulate the petitions; (2) received a Christmas bonus well in excess of any bonus received by other tractor drivers; and (3) the company allowed him to charge the company for a broken glass on his car and waited to deduct the cost from his paycheck until shortly before the ALRB hearing and his eligibility for insurance even though he did not work enough hours during the month he was circulating the petitions to entitle him to coverage, as factors which supported the conclusion that the company not only permitted him to campaign, but also abetted him in his decertification efforts by insuring that he lost nothing because of the time he spent campaigning.

The Board also agreed with the ALJ that the company unlawfully assisted in ***circulating*** the decertification petition and that the company's giving a Christmas party, at which time the decertification petition was circulated in the presence of its supervisors, also constituted unlawful support of the decertification effort.

In reviewing legal precedents on the issue of unlawful employer assistance in the context of decertification elections, the mere fact of unlawful assistance, in and of itself, may not be sufficient to set aside an election. Indeed, a review of those cases in which the Board set aside the decertification election in which unlawful employer assistance was found, involved a variety of factors. These factors include, but are not limited to, employer instigation of the decertification petition [***Abatti Farms, Inc.*** (1981) 7 ALRB No. 30]; concurrent unfair labor practices of the employer affecting employee free choice [***Nick J. Canata*** (1983) 9 ALRB No. 8; ***M. Caratan, Inc.*** (1983) 9 ALRB No. 33] refusals to bargain in good faith as affecting the employees' free choice and undermining employee support for the certified union [***M. Caratan,***

Inc., supra, Slip Opinion at pp. 13-14];[2] and lastly, the nature and extent of the alleged misconduct in light of the margin of victory [***Mann Packing Co., supra***, 16 ALRB No.15, p. 4 citing to ***Silva Harvesting, Inc.***, 11 ALRB No.12 (1985)].

For example in ***Jack or Marion Radovich*** (1983) 9 ALRB No. 45, the ALRB had occasion to set forth the parameters of an employer's free speech during the course of a decertification campaign. In affirming the Administrative Law Judge's findings that the employer's speeches and leaflet did ***not*** constitute unlawful "assistance" to the decertification campaign, the Board also found them not to be objectionable as misrepresentations or captive audience speeches. The ALJ's decision engaged in an extensive analysis of the meaning of "assistance" given to an employee petitioner gathering signatures from fellow workers.

The ALRB's General Counsel contended that employer involvement was demonstrated when it allowed the decertification petitions to be circulated on company property and on company time relying upon ***Snyder Tank Corp.*** (1969) 177 NLRB 724, 735, ***enforced***, 428 F.[2d] 1348. However, the ALJ correctly noted that the above case does not stand for the proposition that employee activity on company property and on company time is necessarily an unfair labor practice. Indeed, the NLRB early held that merely permitting union activity on company time was not evidence of unlawful assistance in an 8(b)(2) context absent some showing of discrimination. [See, e.g., ***Interstate Mechanical Laboratories, Inc.*** (1943) 48 NLRB 51-54; ***National Labor Relations Board v. Mathison Alkali Works, Inc.*** (1941) 14 F.[2d] 796, 803]. The ALJ also rejected the General Counsel's argument that the employer has a duty to ***prevent*** circulation of a decertification petition on company time. [***Curtiss Way Corp.*** (1953) 105 NLRB 642; ***Southeast Ohio Egg Producers*** (1956) 116 NLRB 1076].

This Board has also held that an employer did not interfere with an election by simply allowing employees to circulate decertification petitions and to discuss the decertification on company time. [***TNH Farms, Inc.*** (1984) 10 ALRB No. 37].

Also, an employer is free to respond to employee inquiries concerning their rights, including providing them with information about their right to decertify an incumbent union, and can refer them to or suggest an attorney or person whom they can consult with about their rights. [***Peter D. Solomon dba Cattle Valley Farms*** (1983) 9 ALRB No. 65].

In reviewing numerous legal precedents under the ***Agricultural Labor Relations Act*** ("Act"), it appears that unlawful employer assistance, when coupled with instigation of the decertification petition or serious unfair labor practices that either coerce or affect the free choice

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[2] This factor alluded to in some Board decisions involves the conduct of the employer in apparent violation of the duty to bargain in good faith with the certified company representative during the decertification election campaign. [See e.g., ***Limoneira Company*** (1987) 13 ALRB No. 13 (Concurring Opinion of Member Henning); ***Mayfair Packing Co.*** (1987) 13 ALRB No. 20 (Dissenting Opinion of Member Henning); and ***Peter D. Solomon dba Cattle Valley Farms*** (1983) 9 ALRB No. 65.]

of the agricultural employees in the bargaining unit, may warrant the remedy of dismissing the decertification petition.

However, when only unlawful employer assistance is found, the Board will look to the particular facts and circumstances of each case to determine, based upon the totality of the circumstances, whether the unlawful employer assistance warrants dismissal of the petition.

For example, in ***Jack or Marion Radovich***, ***supra***, the employer made speeches to each of three crews after the decertification petition had been filed and also handed out a two-page leaflet. The speeches and leaflet accused the UFW of telling lies and making false promises, compared the benefits in effect at non-union ranches to UFW contract benefits, stated that the employer's employees were receiving lower wages and benefits than employees at non-union farms because the UFW would not agree to offers made by the employer, and claimed that the UFW was considering raising the amount of its membership dues.

The Board affirmed the ALJ's finding that the speeches and leaflet did not constitute unlawful "assistance" to the decertification campaign and did not find them to be objectionable as misrepresentations or captive audience speeches.

In ***TNH Farms, Inc.*** (1984) 10 ALRB No. 37, the Board adopted the ALJ's conclusion that merely permitting the circulation of the ***decertification*** petition on company time or allowing employees to discuss, during working hours, getting rid of the union has been held insufficient to support a finding of active employer instigation or participation and assistance in a decertification campaign. [See ***Jack or Marion Radovich*** (1983) 9 ALRB No. 45; ***Interstate Mechanical Laboratories, Inc.*** (1943) 48 NLRB 551; ***Curtiss Way Corp.*** (1953) 145 NLRB 642].

In ***Mayfair Packing Co.*** (1987) 13 ALRB No. 20, the Board affirmed the ALJ's decision to discredit the testimony of one of the decertification petitioners that the employer had assisted the decertification and instigated it with promises of benefits to the petitioners. The alleged company assistance consisted of permitting the petitioners to solicit signatures on company time and in company vehicles, by helping them locate potential signatories, and by giving them specific instructions about how to persuade undecided employees. The ALJ specifically discredited the testimony of one of the petitioners who testified that he spent two to three hours per day soliciting signatures.

Similarly, the National Labor Relations Board (NLRB) has had various occasions to address allegations of unlawful employer assistance in the context of decertification elections.

For example, in ***Morganton Full Fashion Hosiery Co.*** (1954) 107 NLRB 1534, 3 LRRM 1421, the employer did not interfere with the decertification election by furnishing the petitioner with a mailing list of the company's employees, in the absence of any request by the union for a

mailing list or a showing that such a request would have been futile. [In accord, ***DeVilbiss Co.*** (1956) 115 NLRB 1164, 38 LRRM 1010].

In ***HR Huntting Co., Inc.*** (1965) 60 LRRM 1514, the NLRB ruled that an employer did not interfere with a decertification election by permitting two instances of anti-union solicitation during working time before the election, although there was a valid no-solicitation rule in effect, there was no evidence of supervisory instigation or participation in such anti-union activities or any enforcement of the rule with respect to union adherence.

It has been held that an employer does not violate the Act by referring an employee to the Board in response to a request for advice relative to removing a union as the bargaining representative. [***Kono-TV-Mission Telecasting, Corp.*** (1967) 163 NLRB 1005, 1006, 65 LRRM 1082].

In ***Ernst Home Centers, Inc.*** (1992) 308 NLRB 848, 142 LRRM 1310, the employer lawfully provided, in response to an employee's request, language to be used in drafting a decertification petition, where there was no evidence as to who, if anyone, suggested or encouraged the employee to file the petition.

In ***Washington Street Brass & Iron Foundry, Inc.*** (1983) 268 NLRB No. 40, 114 LRRM 1276, the NLRB found that an employer did not violate the Act despite allegations that it had assisted an employee in preparing and filing a decertification petition. The NLRB found that the employer did not instigate the decertification effort; it merely provided, upon the employee's request, some inconsequential changes in wording in the petition; the employee circulated and obtained signatures on the petition without the employer's approval; the employer allowed the employee to take a day off to file the petition with the NLRB regional office, but it required him pursuant to past practice to make up for the absence; and lastly, the employer agent who gave the employee a ride to the regional NLRB office was going to the city in which the office was located.

In ***Quinn Co.*** (1984) 273 NLRB No. 107, 118 LRRM 1239, the NLRB ruled that an employer acted lawfully when two of its statutory supervisors circulated a decertification petition among co-workers at one of the employer's facilities and told the employees that they personally favored decertification. The employer did not encourage, authorize or ratify the supervisors' conduct or lead employees reasonably to believe that the supervisors were acting on behalf of management.

In ***BASF Wyandott Corp.*** (1985) 276 NLRB No. 175, 120 LRRM 1243, the NLRB found that an employer had lawfully escorted an employee to another worker's restricted area where the employee asked the worker to sign the decertification card.

In ***Manhattan Eye, Ear & Throat Hospital*** (1986) 280 NLRB 113, 123 LRRM 1078, the NLRB found that an employer had acted lawfully when its supervisors made arrangements to

facilitate the employees' attendance at a meeting called by anti-union co-workers to find out how employees could legally go about getting rid of the union, even though the subject of decertification of the union was discussed at the meeting.

A close review of numerous ALRB decisions involving decertification elections reveals that in those instances where the extent of employer misconduct involves some amount of unlawful ***assistance***, the Board will not set aside the results of the decertification election on that basis alone. Indeed, in those instances where the ALRB has set aside decertification elections, the employer's unlawful assistance has been coupled with either: (1) employer instigation of the petition; (2) pervasive or serious unfair labor practices associated with the election campaign; (3) an employer's refusal to bargain in good faith or undermining of the certified bargaining representative; or (4) other unlawful misconduct of the employer. [See, e.g., ***Abatti Farms, Inc.*** (1981) 7 ALRB No. 36; ***Nick Canata*** (1983) 9 ALRB No. 8; ***Peter D. Solomon dba Cattle Valley Farms*** (1983) 9 ALRB No. 65; ***S & J Ranch, Inc.***, (1992) 18 ALRB No. 2; ***M Caratan, Inc.*** (1983) 9 ALRB No. 33; ***Nick J. Canata*** (1983) 9 ALRB No. 9].

The NLRB has reached the same conclusions. For example, in ***Placke Toyota, Inc.*** (1974) 215 NLRB No. 66, 88 LRRM 1020, the NLRB found that the employer had violated the Act by rendering assistance and support to an employee petition to decertify the incumbent union. Apart from lawfully referring the employee to the NLRB in response to the employee's request for advice in removing the union as the collective bargaining representative, the employer also engaged in the following acts which constituted unlawful assistance: (1) The employer permitted the decertification petition to be circulated as a company document on the employer's letterhead; (2) The employer continued to give the petition its open support, or the clear impression of open support, by allowing the petition to remain for several days on the supervisor's desk; and (3) After all employees had signed the petition, the supervisor asked one employee to file the petition with the NLRB, and when the employee refused to do so, the supervisor said that he would ask another employee to do it.

In ***D & H Manufacturing Co.*** (1978) 239 NLRB 393, 99 LRRM 1624, the Board approved the Administrative Law Judge's finding that the employer had violated Section 8(a)(1) of the Act by ***soliciting*** employees to sign a decertification petition, promising them economic benefits to induce them to abandon the union, notifying employees that their continued membership in or support for the union would be futile, and threatening an employee with discharge or removal from consideration for promotion if he testified in connection with an NLRB proceeding.

In ***Silver Spur Casino*** (1984) 270 NLRB No. 155, 116 LRRM 1233, the NLRB found that an employer had violated the Act by encouraging and assisting employees to decertify the incumbent union. The employer initiated the decertification idea and implanted it in the employees' minds; it helped in drafting of language of the decertification petition; it knew and approved of circulation of the petition; and made copies of the petition and mailed it to the NLRB on behalf of the petitioners.

Indeed, the NLRB has long taken the view that an employer-instigated decertification petition ought to be cancelled and the parties returned to the status quo ante. [See, e.g., ***Hall Industries, Inc.*** (1989) 239 NLRB 785, 131 LRRM 1301 (Employer sponsored and encouraged the filing of decertification petition along with threatening employees with plant closure or discharge for continuing to support the union); ***Texaco, Inc.*** (1982) 264 NLRB 1132, 111 LRRM 1576 (The employer proposed the idea of the petition, drafted and typed it, aided employees in circulating the anti-union petition, encouraged them to sign the petition.); ***Alexander Linn Hospital Association*** (1988) 288 NLRB No. 18, 127 LRRM 1318 (Decertification petition required to be dismissed where it was tainted by employer's unlawful unilateral subcontracting of bargaining unit work that was designed to undermine employees' support for or cause their disaffection with the union); ***Ron Tirapelli Ford, Inc. v. NLRB*** (7th Cir. 1993) 987 F.2d 433, 142 LRRM 2655 (Decertification petition found tainted due to the employer's encouragement and assistance in the initiation of the decertification petition and coercion of employees into signing it. Employees were also promised better benefits and a company profit sharing plan when the union was ousted.)].

As the foregoing NLRB precedents demonstrate, in those instances where the NLRB has invalidated a decertification election on the grounds that it was tainted, ***ab initio***, due to the employer's unlawful assistance, in each situation there was either active encouragement and initiation of the petition by the employer, including unfair labor practices which affected the employees' free choice and undermined the collective bargaining representative.

Thus, merely providing unlawful assistance to a worker, without more, is not sufficient to warrant invalidation of a decertification petition.

Unlike the **National Labor Relations Act**, the ALRB employs an objective "outcome-determinative" test and has rejected the highly technical "laboratory conditions" standard for determining whether an expression of employee free choice will be set aside. Thus, either party, whether it be a labor organization or agricultural employer, objecting to an election can meet its burden by a showing of specific evidence that misconduct occurred and that this misconduct tended to interfere with employee free choice to such an extent that it affected the results of the election. [***Brights Nursery, supra*** 10 ALRB No. 18, pp. 6-7; in accord, ***J. Oberti, Inc., et.al.***, 10 ALRB No. 50].

The ALRB must also be mindful that it is required to ***certify*** the results of a free and fair election pursuant to the provisions of Labor Code §1156.3(c) unless it is persuaded that sufficient reasons exist for the Board not to do so. [***Arco Seed*** (1988) 14 ALRB No. 6]. In effect, Labor Code §1156.3(c) creates a presumption in favor of certification, whether of a representation or a decertification election. [See, e.g., ***Ruline Nursery Co. v. ALRB*** (1985) 169 Cal. App. 3d 247, 216 Cal. Rptr. 162].

Lastly, the Board must also consider, as an additional factor in its analysis, the nature and extent of the alleged misconduct in light of the margin of victory. [***Mann Packing Co., supra***, 16 ALRB No. 15, p. 4 citing to ***Silva Harvesting, Inc.*** (1985) 11 ALRB No. 12].

Therefore, in the absence of a valid tally of ballots of the decertification election, it would appear highly inappropriate for the Board to dismiss a decertification petition pursuant to its objective outcome-determinative test in those cases where the only unfair labor practice committed by the employer may be unlawful assistance to the petitioning employees. Even the NLRB which does not employ an outcome-determinative test, has recognized this principle. For example, in ***Clark Equipment Co.*** (1986) 278 NLRB 498, 121 LRRM 1258, the NLRB found unlawful conduct by the employer involving eight different employees. This post-petition misconduct included unlawful interrogation accompanied by coercive statements and threats, including unlawful surveillance. Although the ALJ recommended setting aside the election, the NLRB disagreed:

> ***"...[w]e conclude that [the misconduct] that did occur does not warrant setting aside the election. In reaching this determination, we are cognizant that it is the Board's usual policy to direct a new election whenever an unfair labor practice occurs during the critical period since 'conduct violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrambled choice in election.' However, the Board has departed from this policy in cases where it is virtually impossible to conclude that the misconduct could have affected the election results. In determining whether misconduct could have affected the results of the election, we have considered 'the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors'.***
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> ***Here, the respondent engaged in the above-described incidents of pre-election misconduct involving eight different employees. However, these incidents occurred in a unit of over 800 employees and in the midst of an active and open campaign...further, all incidents involved only one or two employees, and no evidence of dissemination was presented. Taking these factors into consideration, we cannot conclude that this misconduct could have affected the results of the election, which with a tally of 391 for and 489 against, the union, cannot be characterized as close. We, accordingly, overrule all the objections and certify the results of the election." [Id at 503]***

As the foregoing case demonstrates, even the NLRB has evaluated the impact of employer misconduct in certain instances. Without an actual tally of ballots, dismissal of a decertification petition based merely upon a finding of unlawful assistance to the petitioning employees, would be punitive in nature. [***Laughlin & Laughlin v. ALRB*** (1985) 166 Cal. App. 3d 368, 381 (When an order of the ALRB is so severe in comparison to the conduct involved and

its effect on the free exercise of employee rights that it is clearly punitive in character, the order will be annulled.)].

In conclusion, VCAA respectfully submits that in decertification cases where there has been a finding of unlawful employer assistance to the petitioner, the Board must first engage in an evaluation of the nature and extent of the unlawful assistance to the petitioning employees. If the unlawful assistance is accompanied by other unfair labor practices which clearly undermine the certified bargaining representative or constitute unfair labor practices affecting the employees' free choice, the tainted decertification petition should be dismissed.

However, in the absence of supporting unfair labor practices of the employer, the Board should evaluate the unlawful employer assistance in conjunction with the margin of victory. The Board should not leave the impact of the alleged unlawful assistance to conjecture by assuming that isolated or ***de minimis*** conduct of one or two supervisory employees can reasonably be expected to have been discussed or disseminated among the remaining bargaining unit employees. In such cases, in order to carry out the stated goals of the **Agricultural Labor Relations Act**, the Board must also examine the results of the election to truly effectuate employee free choice.

B. Do the factors listed in ***Overnite Transportation Co.*** (2001) 333 NLRB 1392, 166 LRRM 1280 apply in cases involving unlawful employer assistance in procuring the showing of interest for a decertification petition?

In ***Overnite Transportation Co.*** (2001) 333 NLRB 1392, 167 LRRM 1212, the NLRB relied upon the previous case of ***Master Slack Corp***. (1984) 271 NLRB 78, 116 LRRM 1324 to evaluate whether a causal relationship exists between unfair labor practices and the subsequent expression of employee disaffection with an incumbent union.

These factors include: (1) the length of time between the unfair labor practices and the withdrawal of recognition or filing of the [decertification] petition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. [167 LRRM at 1215; citing to ***Master Slack Corp.***, 271 NLRB at 84; ***Lee Lumber and Building Material Corp.*** (1996) 322, 175, 177 at fn. 16; 153 LRRM 1158.]

In ***Overnite Transportation Co., supra***, the NLRB noted that not every unfair labor practice will taint a union's subsequent loss of majority support or taint a decertification petition. ***There must be a causal connection.*** Thus, in cases involving a complaint alleging an 8(a)(5) [Section 1153(e)] refusal to recognize and bargain with an incumbent union, the causal relationship between the allegedly unlawful act or acts and any subsequent loss of majority support or employee disaffection may be presumed. [See ***Lee Lumber and Building Material Corp., supra***, (1996) 322 NLRB 175, 177, 153 LRRM 1158; ***Sullivan Industries*** (1997) 322

NLRB 925, 926, 155 LRRM 1029]. However, where a case involves unfair labor practices other than a general refusal to recognize and bargain, a causal connection must be shown between the unfair labor practices and the subsequent employee disaffection with the union in order to find that a decertification petition is tainted, thereby requiring that it be dismissed. [***Lee Lumber, supra,*** 322 NLRB 177; ***Williams Enterprises*** (1993) 312 NLRB, 937, 939, 145 LRRM 1180, enforced 50 F.3d 1280, 148 LRRM 2978 (4th Cir.) 1995].

While VCAA believes that the ALRB should be guided by certain factors in establishing whether there are tainted signatures on a decertification petition, in the first instance, VCAA does not agree that employer conduct that is the subject of a settlement agreement containing a non-admissions clause may serve as the basis of a finding under ***Master Slack*** that the employer's conduct tainted a subsequent decertification petition. Employers may enter into either a formal or informal settlement agreement for a multitude of reasons. These reasons include, but are not be limited to, a desire to avoid lengthy litigation, costs of litigation, public acknowledgment of violations of the Act, the impact of litigation on competition, or an employer's willingness to maintain a violation-free record. In any event, to ascribe legal effect to conduct which has not been admitted to by the employer, would create a disincentive for many agricultural employers to voluntarily enter into settlement agreements before the Board.

More importantly, such a procedure would allow the Board to contravene the Act by finding violations of the Act in the absence of substantial evidence.

For example, in the recent case of ***BPH & Co., Inc. v. NLRB*** (D.C. Cir. 2003) 333 F.3d 213, 172 LRRM 2865, the Court of Appeal set aside an NLRB determination that the employer's alleged unfair labor practices caused loss of support for the incumbent union. The Court of Appeal also ruled that the NLRB's finding that the employer's resulting withdrawal of recognition did not violate the Act because it was not based upon substantial evidence. The Court noted that the only evidence the Board relied upon was a prior settlement agreement resolving the employer's alleged unlawful withdrawal of recognition, in which the employer agreed not to assist or solicit employees in the promotion or circulation of the decertification petition, but admitted no wrongdoing.

The Court of Appeal correctly noted :

> ***"Here the Board's rule contravenes the Act because it allows the Board to routinely find a violation of the Act in the absence of substantial evidence. The only evidence on which the Board based its finding that the company's ULPs caused the loss of support for the union is the [settlement] agreement - an agreement that specifically provides that the company admitted no wrong doing. This falls far short of satisfying the substantial evidence standard."***

* * *

"The Board maintains that our rejection of its new rule will undercut Board-supervised settlement agreements because, for example, 'an employer could commit serious unfair labor practices, sign a settlement agreement with a non-admission clause, and then avoid its duty to bargain by relying on the union's loss of majority support attributable to the employer's own unremedied conduct' at .. the Board's argument rests on two fallacious assumptions: First, that a settling party is necessarily guilty of the conduct with which it has been charged; and, second, that the Board will have no way of protecting against parties who seek to use a non-admission clause in a settlement agreement to avoid sanctions for ULPs". [333 F.^{3d} at 222]

For these reasons, VCAA contends that this aspect of he ***Master Slack*** analysis is inappropriate and should not be utilized to demonstrate that such employer conduct taints a subsequent decertification petition.

The factors set forth in ***Overnite Transportation*** support the argument that there must be some level of conduct greater than mere low-level employer assistance or support in order to justify setting aside a decertification election. Also, ***Overnite Transportation*** recognizes that the employer's misconduct must have ***caused*** the employees' disaffection with the union. This rationale requires that an analysis of the ***extent*** of the taint as affecting the showing of interest, which can only be determined by subtracting the tainted signatures in the pre-election context. If a decertification petition was sufficient without the "taint" of the employer's misconduct, then the alleged unfair labor practices did not ***cause*** the filing of the decertification petition or the employees' subsequent disaffection with the union.

More importantly, in applying the ***Overnite Transportation/Master Slack*** factors, the Board must be cognizant of the type of misconduct that the NLRB found to violate those factors as outlined in ***Overnite***. For example, in applying the ***Master Slack*** factors, and finding a causal connection between the unfair labor practices and the subsequent expression of employee disaffection with the incumbent union, the NLRB described the employer's pervasive acts of misconduct as "***serious and pervasive***", "***nationwide***", "***highly coercive***", "***hallmark violations*** - such as the granting of an unprecedented wage increase, as well as threats that employees would lose their jobs and that the employer would close if the employees selected the union - - which are highly coercive and having lasting effect on employees", "***numerous serious and pervasive unfair labor practices***", "***particularly coercive***", "***discriminatory actions***", "***highly coercive and unlikely to be forgotten***". [333 NLRB No. 66 at 4-5]. These numerous, pervasive and egregious acts of employer misconduct are reasonably likely to cause employee disaffection with the incumbent union. Nevertheless, it is the ***level*** of the misconduct that establishes a causal connection in the pre-election context. The Board must take care to properly evaluate the level or extent of employer unfair labor practices and not merely seize upon ***any*** unfair labor practices that may be committed by the employer. If the unfair labor practices are ***de minimis***, then the alleged unfair labor practices did not ***cause*** the filing of the decertification petition or the employees' subsequent disaffection with the union.

Of course, in those cases where the decertification election has been conducted by the Board, the Board should apply its objective "outcome-determinative" test for setting aside the election (i.e., whether the conduct of the employer had any effect on the outcome of the election).

VCAA believes that application of the factors outlined in ***Overnite Transportation, supra***, are instructive and would guide the ALRB in making a proper analysis of low-level employer assistance or support in decertification petitions where there is no other evidence of unlawful instigation or unfair labor practices that would cause employee disaffection with the incumbent union. ***In any event, the burden of proof rests upon the General Counsel to prove the causal connection!***

C. Are NLRB cases involving unlawful employer assistance, in the context of withdrawals and recognition or RM petitions, apposite or inapposite to cases involving only employee-initiated decertification petitions?

VCAA believes that NLRB cases involving unlawful employer assistance, in the context of withdrawals of recognition or RM petitions, are apposite to cases arising under the ALRA involving employee-initiated decertification petitions.

This conclusion is premised upon the observation that cases involving employees circulating a decertification petition under the ALRA to oust a certified collective bargaining representative are highly analogous to those in which employees circulate a petition to oust an incumbent union that was recognized through either the NLRA's voluntary recognition or election process. In both instances, the motive of the employees is ***identical***. Furthermore, both the ALRA and the NLRA recognize that any conduct on the part of the employer that may constitute a violation of Labor Code §1153(a) (NLRA Section 8(b)(1), can invalidate the petition upon a finding that the employees' free choice was affected by coercive conduct on the part of the employer or its management representatives.

For example, the NLRB held that an employer unlawfully withdrew recognition from the union as representative of its maintenance employees, even though a majority of the employees had signed a decertification petition, where the employer unlawfully assisted in the preparation and circulation of the petition. [***Rose Printing Co.*** (1988) 289 NLRB 252, 131 LRRM 1420].[3]

In ***Boren Clay Products Co.*** (1969) 174 NLRB No.129, 70 LRRM 1325, the NLRB ruled that the employer had violated the Act when it ceased to bargain with the incumbent union after a decertification petition was filed, since the decertification petition was circulated and signed through unlawful assistance and participation of the employer, and, therefore, the petition did not

[3] However, the NLRB also held in ***Rose Printing Co., supra***, that the employer ***lawfully*** withdrew recognition from the union as representative of its ***bindery*** employees, where the decertification petition signed by a majority of its employees was not tainted by the employer's unfair labor practices.

raise a valid question concerning representation and could not justify the employer's refusal to bargain.

In ***Boren Clay Products, supra***, the amount of employer participation and assistance in the circulation and signing of the decertification petition involved not only supervisory employees, but also the company's Vice President, and the employer's Director of Industrial Relations. Once the information was obtained through the assistance of the supervisory employees, the information was provided directly to the employer's Director of Industrial Relations who, in turn, contacted the Executive Director of The Merchant's Association and obtained assistance for the employees in the filing of the petition. Clearly, there was extensive employer participation and assistance which justified a finding of the employer's refusal to bargain.

It should be noted that the 4th Circuit Court of Appeal ordered enforcement of the NLRB decision. The Court of Appeal noted that the company's foremen, on more than one occasion, made decidedly coercive, and hence illegal, statements to employees about the union and their participation in it. Worse yet, company officials figured prominently in the encouragement and solicitation of signatures for the decertification petition. [***Boren Clay Products Co. v. NLRB*** 4th Cir. (1970) 419 F.2d 385, 73 LRRM 2207].

In ***Inter-Mountain Dairymen, Inc.*** (1966) 157 NLRB No.126, 61 LRRM 1584, the NLRB ruled that the employer had violated the Act by (1) initiating a drive among employees to obtain an incumbent union's decertification as the bargaining representative; (2) assisted employees in circulating the decertification petition; and (3) solicited employees to sign the decertification petition.

In ***Inter-Mountain Dairymen, supra***, following an employer's suspension of negotiations, several employees began to discuss the possibility of a new election to select a new bargaining representative. The employees thereafter discussed the matter with the plant's General Manager, who requested a named employee to take the necessary steps.

With the assistance of an office secretary, the employee prepared a petition for the employees to sign. The petition stated that the employees "would like to request a new union election" among them. Thereafter, the employee took the petition to the employer's receiving plant and placed it on a supervisor's desk, where employees habitually gathered around between work assignments.

During the next several days, the petition was seen by many of the employer's drivers. When asked by the employees what the purpose of the petition was, the supervisory stated that they could read and sign it if they wished. The supervisor then gave the petition to other drivers who had not seen it.

After about 11 employees had signed the petition, the employee brought it to the General Manager, who then suggested that it be mailed to the employer's counsel for transmittal to the Board's regional office. The office secretary forwarded the petition to the employer's counsel, and the latter subsequently mailed the petition to the regional office.

The Board's regional office found the petition inadequate and mailed the employee the appropriate forms. The office secretary again assisted the employee in completing the form, and thereafter, the employee once more placed the petition on the supervisor's desk for the signature of the employees.

Rejected for the second time by the regional office, the documents submitted by the employee were returned to him, with a new set of petition forms. The employee was requested to fill out the forms completely before re-submitting them. The office secretary again assisted in preparing the documents, which then were brought to the supervisor. The supervisor solicited employees to sign the document. Thereafter, the office secretary handled the mailing of the documents to the Board's regional office.

In ***Suburban Homes Corp.*** (1968) 173 NLRB No. 80, 69 LRRM 1402, the employer violated the Act by a supervisor's solicitation of employee signatures for a de-authorization document by which the employees repudiated the union. The employer further violated the Act by the supervisor's subsequent filing of a decertification petition, since such conduct was part of an unlawful plan to oust the union as the bargaining representative of the employees.

Also, in ***Retail Clerks v. NLRB*** (D.C. Cir. 1967) 373 F.^{2d} 655, 64 LRRM 2108, the U.S. Circuit Court of Appeals found substantial evidence to support an NLRB finding that an employer encouraged and assisted employees in filing union decertification petitions in violation of Section 8(a)(1) of the Act.

Lastly, in ***Condon Transport, Inc.*** (1974) 211 NLRB No. 37, 87 LRRM 1127, the NLRB found that the employer violated Section 8(a)(1) by implicitly suggesting to employees that they file a petition to decertify the union, by obtaining decertification forms for the employees and by obtaining information required to perfect the filing of the decertification petition and providing the employee with this information.

In all of the above cases, in each instance where the Board found a violation of the Act, the employer ***actively*** encouraged and assisted the petitioning employees, through its authorized representatives, in the circulation and solicitation of signatures for the petition. As a result, the Board routinely held that the petitions were tainted or that the refusal to bargain was not justified.

It should also be noted, however, that the Board will require a close temporal link between unremedied unfair labor practices and the decertification petition. [See, e.g., ***Vincent Industrial Plastics, Inc. v. NLRB*** (D.C. Cir. 2000) 209 F.^{3d} 727, 164 LRRM 2039; see also

NLRB v. D&D Enterprises, Inc. dba Beltway Transportation Co. (4th Cir. 1997) 125 F.3d 200, 156 LRRM 2228].

On the other hand, there have been instances in which the NLRB has found ***no*** employer violation of the Act. For example, in ***Kono-TV-Mission Telecasting Corp.*** (1967) 163 NLRB No. 137, 65 LRRM 1082, the NLRB upheld the findings of its trial examiner that the employer neither initiated nor participated in either the preparation or circulation of the petition. The employer did not solicit any employees to sign. It did not assist in forwarding the completed petition to the Board. As far as the record demonstrated, the preparation, circulation and signing of the petition constituted the free and uncoerced act of the employees concerned.

Also, in ***Hydro Conduit Corp.*** (1981) 254 NLRB No. 48, 106 LRRM 1223, the NLRB held that the employer did not violate the Act when it withdrew recognition from its incumbent unions in reliance on an anti-union petition circulated by a foreman. It was found that the foreman was not a supervisor within the meaning of the Act, and in any event, there was no showing that management had anything to do with the preparation of the petition; that the foreman spoke for management; or the employees considered the foreman to be acting on behalf of management.

In ***Hydro Conduit Corp., supra***, the bargaining unit employees were dissatisfied with the representation they received from the unions with particular things such as their pension plan. There had been much discussion among the employee about this and talked of a possible petition. At a meeting conducted on June 22, 1979, employees congregated in the lunchroom. At this meeting, the alleged foreman informed the employees of his position to get rid of the unions and told the employees that they could sign or not sign his petition, whichever they wished. At the meeting, there was no evidence that the alleged foreman predicted or promised anything that the company would do. Nor were any employees pressured into signing the petition.

After reviewing all of the evidence before the Board, the Board noted that there was no evidence to show that management had anything to do with the preparation of the petition or that the alleged foreman spoke for management, or that the employees considered that the alleged foreman was acting on behalf of management. The Board concluded that there was no finding of a violation of the Act ***even if the alleged foreman were a supervisor!***[4]

In reviewing those cases in which the NLRB found ***no*** violation of the Act, the Board relied upon the following factors in concluding that no violation of the Act occurred:

1. That the employer or its ***authorized*** agents did not prepare the petition;

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[4] Compare, ***Nassau Glass Corp.*** (1976) 222 NLRB No. 126, 91 LRRM 1316, in which the Board found a violation of Section 8(a)(1) where a supervisor prepared the petition, solicited employee signatures on the petition and filed the petition. In passing, the Board noted, however, that it may not be unlawful if the supervisor had drafted the petition at an employee's request without further conduct.

2. That the employer or its ***authorized representative*** did not circulate or solicit the petition for employee signature; and

3. The employer did not aid employees in the filing of the petition with the Board.

Clearly, the foregoing NLRB decisions are apposite in assisting the ALRB to evaluate whether employee-initiated decertification petitions circulated on company work time, in a non-coercive context, are a valid expression of the employees' rights under Section 1152 of the Act. Of course, the Board's evaluation of such conduct will be dependent upon the facts and circumstances of each particular case, bearing in mind, that limited employer involvement in this process is not necessarily inconsistent with the employees' exercise of rights under the Act. So long as the employer's involvement does not otherwise constitute unlawful instigation, or the employer's assistance is not coupled with coercive misconduct of management employees affecting employee free choice, the Board should further the policies and purposes of the Act by allowing the results of the decertification election to be finalized subject only to the Board's post-election objection procedures. [8 C.C.R. §20265].

IV. CONCLUSION

VCAA appreciates the opportunity to participate in this public process to provide its legal observations and input on these important issues raised by the Board.

Dated: August 2, 2004

Respectfully submitted,

By: _____

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